this earlier decision was rendered, and in the principal case the plaintiff's contention was fully sustained, on the ground that there is an inherent power in the courts to authorize such incidents of procedure as are necessary to the proper administration of justice in a given case, in the absence of statutory provision. "By this course nobody is injured or defrauded. The defendant can set up any defense that he could have had he appeared as plaintiff. Procedure is not the end for which law was instituted, but the means by which justice may be administered in an orderly manner; and where a particular form of procedure is not prescribed by the Code, as in this case, it is the duty of the court to pursue that which will secure the rights of all the parties, and an orderly trial of the case."[1] J. U. C., Jr.

Receivers — Ex Parte Appointment — Jurisdiction.— The Supreme Court recently held that an order appointing a receiver upon an ex parte application without requiring an undertaking from the applicant until after the order was made is irregular.[1] Although the Court did not mention them, this case must be considered as overruling two decisions of the District Court of Appeal, holding that such an order is absolutely void for want of jurisdiction.[2] These decisions were all made under Section 566 of the Code of Civil Procedure which reads, "If a receiver is appointed upon an ex parte application, the court, before making the order, must require from the applicant an undertaking, with sufficient sureties," etc.

The District Court of Appeal considered a literal compliance with this provision a condition to the court acquiring jurisdiction. It is believed, however, that the view of the Supreme Court is based upon the sounder principles, but it is to be regretted that that Court's opinion upon this point is not supported by citations or analogies. The authorities and considerations presented in this note are submitted with the purpose of fortifying the court's bare conclusions.

Before it was amended in 1873, Section 566 of the Code of Civil Procedure did not mention the subject of ex parte appointments, and at that time, the courts of this State must be considered as having, as a part of the general jurisdiction of courts of equity, power to make such appointments in cases of necessity, without previously requiring that a bond be filed.[3] This power of courts of equity dates from the time of Lord Eldon, at least,[4] and to oust the courts of this State of

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[1] Title Insurance and Trust Company v. California Development Company, et al. (Oct. 18, 1912), 44 Cal. Dec. 506, 127 Pac. 502.

[2] Davila v. Heath (1910), 13 Cal. App. 370, 109 Pac. 893; Bibby v. Dieter (1910), 15 Cal. App. 45, 113 Pac. 874.

[3] Mann v. Gaddie (1907), 158 Fed. 42, Code of Civil Procedure (Cal.), Section 564, Subd. 6.

[4] Tanfield v. Irvine (1826), 2 Russell 149; Sanford v. Sinclair (1840), 8 Paige 373.

such a well established jurisdiction, a clear expression of the legislative intention to that effect should be required.[5] It is presumed "that the Legislature, in the enactment of statutes, does not intend to overturn long established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication."[6] The amendment of 1873, which first mentioned the matter of ex parte appointments by providing that the court "may require" an undertaking from the applicant, was construed not to affect the court's jurisdiction to make such an appointment without requiring an undertaking from the applicant.[7] Nor did the change in 1907 from "may require" to "must require" necessarily require the bond as a jurisdictional fact. The words, "shall" and "must" may be directory as well as mandatory, their effect in a particular case depending upon whether "the prescribed mode of action is of the essence of the thing to be accomplished."[8] In the principal case the essence of the thing to be accomplished was the protection of the defendant. Although this was not done in the first place by requiring the bond before the order was made, the filing of the undertaking afterwards, covering past as well as future damages, clearly accomplished the same purpose.

This was the conclusion reached in interpreting a similar section of the code. Section 529 of the Code of Civil Procedure reads: "On granting an injunction, the court or judge must require, . . . a written undertaking on the part of the applicant, with sufficient sureties," etc. This provision, it was held, was directory, and if the undertaking was not provided before the order was made the procedure would be irregular merely.[9] This same conclusion has been reached in a number of other cases.[10]

If what we have urged be correct, it would follow that, in the principal case, the order being irregular merely, the defect was cured by requiring the applicant afterwards to file an undertaking protecting the defendant from past as well as from future damages.[11] Jurisdiction once acquired can not be divested by the failure to observe the most mandatory requirements.[10] B. B. B.

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[5] 26 American & English Encyc. of Law, p. 645.

[6] In re Garcelon (1894), 104 Cal. 570, 584, 38 Pac. 414.

[7] Fischer v. Superior Court (1895), 110 Cal. 129, 138, 42 Pac. 561.

[8] Appeal of Spencer (1905), 78 Conn. 301, 61 Atl. 1010; Spears v. Mayor, etc. of New York (1878), 72 N. Y. 442; In re Rutledge (1900), 47 L. R. A. 721 (New York).

[9] Emeric v. Alvarado (1884), 64 Cal. 529, 626, 2 Pac. 418; Lambert v. Haskell (1889) 80 Cal. 611, 616, 22 Pac. 327.

[10] McCrea v. Haraszthy (1875), 51 Cal. 146; Ions v. Harbison (1896), 112 Cal. 260, 267, 44 Pac. 572; In re Chadbourne's Estate (1911), 15 Cal. App. 363, 114 Pac. 1012; Horkan v. Beasley (1912), 75 S. E. 341 (Ga.); Weldon v. Rogers (1910), 157 Cal. 410, 108 Pac. 266, construing Sec. 692 Code Civil Procedure (Cal.).

[11] Johnson v. Yaung (1901), 95 N. W. 497.